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06 September 2019

Version of attached file:

Accepted Version

Peer-review status of attached file:

Peer-reviewed

Citation for published item:

Panasci, Maria Antonia (2019) 'The right to paid annual leave as an EU fundamental social right. Comment on Bauer et al. : joined Cases C-569/16 and C-570/16 Stadt Wuppertal v. Maria Elisabeth Bauer and Volker Willmeroth v. Martina Broßonn, EU:C:2018:871.', *Maastricht journal of European and comparative law.*, 26 (3). pp. 441-448.

Further information on publisher's website:

<https://doi.org/10.1177/1023263X19841762>

Publisher's copyright statement:

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**The right to paid annual leave as an EU fundamental social right. Comment on *Bauer et al.*
Joined Cases C-569/16 *Stadt Wuppertal v Maria Elisabeth Bauer* and C-570/16 *Volker Willmeroth v Martina Broßonn***

On 6 November 2018, the Grand Chamber of the European Court of Justice (the Court) delivered its judgment in joined cases C-569/16 *Stadt Wuppertal v Maria Elisabeth Bauer* and C-570/16 *Volker Willmeroth v Martina Broßonn* (*Bauer et al.*), in response to a preliminary reference lodged by the German Federal Labour Court (*Bundesarbeitsgericht*). Seised of a request regarding the interpretation and horizontal application of the right to paid annual leave, the Court held that the heirs of a deceased worker can directly invoke Article 7 of the Working Time Directive against a public employer or Article 31 (2) of the Charter of Fundamental Rights of the European Union (the Charter) against a private employer to be granted an allowance in lieu of paid annual leave not taken by the worker at the time of their death, and thus to require the national court to disapply a national legislation that precludes such a payment.

Beside addressing the issue of horizontal direct effect of the Charter - which is the most remarkable point on which the ruling has already received attention¹ - the judgment raises cognate constitutional issues, such as the relationship between EU primary and secondary law and, more broadly, the constitutional status of fundamental social rights in the Charter era.

The factual background and the questions referred

The judgment originated from a request for preliminary ruling made by the German Federal Labour Court in relation to two similar proceedings, that differ in one particular aspect. Two surviving spouses, Mrs Bauer and Mrs Broßonn, brought an action against the former employers of their late husbands, claiming the payment of an allowance in lieu of paid annual leave not taken by their spouses at the time

¹ See D. Sarmiento, 'Sharpening the Teeth of EU Social Fundamental Rights: A Comment on *Bauer*', *Despite the differences* (2018) <https://despiteourifferencesblog.wordpress.com/2018/11/08/sharpening-the-teeth-of-eu-social-fundamental-rights-a-comment-on-bauer/>; E. Frantziou, Joined Cases C-569/16 and C-570/16 *Bauer et al.*: '(Most of) the Charter of fundamental rights is horizontally applicable', *European Law Blog* (2018) <http://europeanlawblog.eu/2018/11/19/joined-cases-c-569-16-and-c-570-16-bauer-et-al-most-of-the-charter-of-fundamental-rights-is-horizontally-applicable/>.

of their deaths. The defendants were, respectively, a public law body (the Stadt Wuppertal) in *Bauer*, and a private party (Mr Willmeroth) in *Broßonn*.

Notwithstanding the different nature of the employer, the cases raised the same legal question, namely the compatibility of the German legislation relevant to the situations of the main proceedings with Article 7 of the Working Time Directive 2003/88/EC² and Article 31 (2) of the Charter.

Specifically, in light of the combined reading of Paragraph 7 (4) of the Federal Law on leave (the BUrlG) - being the national legislation implementing the Working Time Directive - and Paragraph 1922 (1) of the German Civil Code (the BGB), the allowance in lieu of leave could not become part of the deceased worker's assets, and thus be passed on to the legal heirs by inheritance.

The referring court recalled the *Bollacke* judgment,³ where the same provisions of the German law were already found incompatible with Article 7 of Directive 2003/88, in that they precluded the entitlement to an allowance in lieu of outstanding paid annual leave when the employment relationship was terminated by the worker's death.

Nevertheless, according to the national judge, that precedent ruling did not specifically address the question whether, by virtue of the combined reading of Paragraph 7(4) of the BUrlG and Paragraph 1922 (1) of the BGB, the entitlement to an allowance in lieu could not form part of the deceased's estate and thus not be inherited by their heirs. Moreover, the German court argued that making an allowance in lieu payable to the deceased worker's heirs would have been inconsistent with the purpose of annual leave, which is to ensure a period of rest and relaxation to the worker. To further motivate its doubts, the referring judge recalled the teleological interpretation embraced in *KHS*,⁴ where the Court identified the objective attached to the right of annual leave with the protection of the worker's health and safety.

Therefore, being confronted with the impossibility of interpreting the national provisions in conformity with EU law, the German court referred two questions to the Court for a preliminary ruling, the first of which was posed in identical terms for both cases, and the second only in respect of Case-570/16.

² Directive 2003/88/EC of the European Parliament and of the Council of 4 November 2003 concerning certain aspects of the organization of working time OJ 2003 L 299.

³ Case C-118/13 *Gülray Bollacke v. K + K Klaas & Kock B.V. & Co. KG* EU:C:2014:1755.

⁴ Case C-214/10 *KHS* EU:C:2011:761.

Specifically, it asked whether (a) Article 7 of Directive 2003/88/EC or Article 31 (2) of the Charter precludes a national legislation such as the German one at issue in the main proceedings, according to which the right to paid annual leave not taken lapses upon the death of the employee without converting into an allowance in lieu transferable by inheritance to their heirs; (b) whether those EU law provisions are capable of direct effect in disputes between private parties.

Analysis of the judgment

The judgment delivered by the Court can be divided in two conceptual chunks, the first of which dealing with the substantive content of the right to paid annual leave, and the second with its enforceability in the context of a vertical (*Bauer*) and horizontal situation (*Broßonn*).⁵

For the purposes of a more detailed analysis, the Court further unpacked the first question referred into two distinct but logically correlated parts regarding the interpretation of the right to paid annual leave in light of the relevant provisions of EU law (first sub-question), and the direct effect of those provisions, resulting in the duty of the national court to disapply the national legislation inconsistent with them (second sub-question).

In examining the first sub-question, the Court drew on the richly articulated Opinion of Advocate General Bot, who deconstructed the right to paid annual leave into two different aspects: a) the right to leave as such, the effectiveness of which is protected by the mandatory nature of Article 7 (2) Directive 2003/88, which does not permit the replacement of the minimum annual leave by an allowance in lieu, except in case of termination of the employment relationship; b) the financial compensation for the days of annual leave not taken before the termination of the employment relationship, of which the worker's death is only one of the possible reasons.⁶

It follows from the evident pecuniary dimension of annual leave that the worker's death cannot entail the total loss of this right: although the enjoyment of a period of rest and relaxation is precluded, the

⁵ To be fair, given that both cases imply a national legislation and the exclusionary effects of EU law in case and the interpretation to be given to the second situation qualifies better as a vertical dispute with horizontal incidence

⁶ Opinion of Advocate General Bot in Joined Cases C-569/16 and C-570/16 *Bauer et al.* EU:C:2018:337. The Advocate General also pointed out how both the factual scenario and the reasoning in *Bollacke* already assumed the inheritable nature of the right to paid annual leave. Considerations about the possible inheritance of an allowance in lieu of outstanding annual leave must have necessarily been taken into account in that judgment, otherwise the decision of the case would have been totally ineffective in its practical application.

financial component attached to the right must become part of the inheritable assets of the worker. Consequently, the holder of the right to paid annual leave, already accrued upon his death, cannot be retroactively deprived of that monetary entitlement.⁷

The Court fleshed out the meaning of the right to paid annual leave not only by reference to Article 7 of Directive 2003/88, but also to Article 31 (2) of the Charter. Indeed, the Court found that the right to paid annual leave is not only a ‘particularly important principle of EU social law’, but also a fundamental right now expressly enshrined in the Charter, which has the same legal value as the Treaties.

Therefore, Member States cannot legitimately restrict the scope of the right to paid annual leave to the point of eroding its essential pecuniary dimension: conditions should be imposed pursuant to Article 51 (2) of the Charter, and in compliance with the essential core of the right which comprises the payment of a financial allowance.

Having inquired into the reach of the right to paid annual leave, the Court turned its analysis on the direct effect of Article 7 of the Working Time Directive and Article 31 (2) of the Charter, that is the capacity of these provisions to displace an incompatible national legislation (second sub-question). With specific regard to Article 7 of Directive 2003/88, the Court recalled its previous finding in *Dominguez*,⁸ where said provision was found to fulfil the criteria of sufficient precision and unconditionality required to produce direct effect according to settled case law. Prescribing a precise obligation on Member States, the satisfaction of which is not coupled with any additional condition, Article 7 of Directive 2003/88 can be directly relied upon by individuals, at least in vertical disputes. Therefore, the Court concluded that Mrs Bauer could invoke Article 7 of Directive 2003/88 against the former employer of her late husband, i.e. a body governed by public law.

On the contrary, having reaffirmed the lack of horizontal direct effect of directives, the Court found it impossible to apply the same solution to the case of Mrs Broßonn, who brought an action against a person governed by private law.

Nonetheless, the Court accepted to grant Mrs Broßonn the entitlement to an allowance in lieu, and to this end it followed the conceptual framework traced by Advocate Bot to allow individuals to claim effective protection of the rights conferred on them by EU law.

⁷ Joined Cases C-569/16 and C-570/16 *Bauer et al.* EU:C:2018:871, para 39-50.

⁸ Case C- 282/10 *Dominguez* EU:C:2012:33

The reasoning started from the observation that many legal instruments, such as the European Social Charter, the ILO Convention No 132 and the Community Charter of Fundamental Social Rights of Workers, to which Member States have bound themselves, recognise the right to paid annual leave. Consequently, Directive 2003/88 and its predecessor simply codified a pre-existing right that constitutes an essential and mandatory principle of EU social law.

The mandatory nature of such a right can be inferred from a textual argument, namely the lack of further conditions and limitations imposed on its enforceability. Article 31 of the Charter does not need to be given concrete expression by provisions of EU or national law, which are only supposed to give practical indications for the exercise of that right (such as the concrete duration of the leave).

Given its mandatory nature, the right enshrined in Article 31 of the Charter is sufficient in itself to confer on workers a right that can be relied on by them against their employers ‘in a field covered by EU law and therefore falling within the scope of the Charter’. With regard to the capacity of Article 31 of the Charter to have horizontal direct effect, then, Article 51 (1) does not represent an obstacle, as provisions addressed to States are not for this sole reason meant to not produce effects in relations between individuals.⁹

It follows that in *Broßonn* regarding a dispute between two individuals, the fundamental social right of paid annual leave, expressly enshrined in Article 31 of the Charter, can be invoked by the legal heir of a deceased worker in order to challenge a national legislation that precludes the entitlement to an allowance in lieu of a paid annual leave not taken by the worker in the course of the employment relationship terminated by the event of their death.

Commentary

The most significant contribution of *Bauer et al* stems from the finding that the right to paid annual leave is ‘not only a particularly important principle of EU social law’, but, as in the words of the Advocate

⁹ In the same sense also the Advocate General’s Opinion at paragraph 78, recalled by the Court. See Opinion of Advocate General Bot in Joined Cases C-569/16 and C-570/16 *Bauer et al*. EU:C:2018:337, para 78.

General, ‘also and above all [...] a fundamental social right *in itself*,¹⁰ enshrined in Article 31 (2) of the Charter and given concrete expression in Article 7 of the Working Time Directive 2003/88.

This affirmation is important in as much as it clarifies (a) the constitutional status of the right to paid annual leave and (b) its collocation in the EU hierarchy of norms by identifying its legal basis in the Charter rather than in other sources (whether general principles of EU law or the combination of a general principle and a directive *à la Küçükdeveci*).¹¹

With respect to the first point, it should be noted that the Court’s pronouncement on the nature of the entitlement to paid annual leave, which is now explicitly granted the status of a Charter’s fundamental *right*, is not just an exercise of terminological clarification, but it is the gateway to its direct effect, namely the possibility for private parties to rely directly on the EU right to paid annual leave both in vertical and horizontal disputes.

Although the recognition of a Charter provision as a directly effective subjective right is of lesser significance with respect to vertical disputes, where the Charter has *de facto* been given vertical direct effect in a few cases,¹² it has a remarkably novel impact on disputes between individuals given its potential for the horizontal application of the Charter, or at least some of its provisions.

Intertwined with the issue of direct effect is the second point mentioned, namely the relationship between primary and secondary law, and the scope of application of the Charter. If the Charter is to be considered the primary source of EU fundamental rights in the post-Lisbon Union, then it becomes the final standard of legality against which the national legislation is to be reviewed. As a result, the reference in primary law to the conditions and limitations set out in secondary law cannot deprive a right enshrined in the Charter of its normative core content, provided that it has the qualities –

¹⁰ See Joined Cases C-569/16 and C-570/16 *Bauer et al.*, para 51 and Opinion of Advocate General Bot in Joined Cases C-569/16 and C-570/16 *Bauer et al.*, para 57 (emphasis added).

¹¹ It is well known that in case C-144/04 *Mangold* ECR I-9981 the Court found the principle of non-discrimination on grounds of age to be a general principle of EU law, while in case C-555/07 *Küçükdeveci* ECRI-365, the Court ambiguously referred to the EU general principle of non-discrimination on grounds of age “as given specific expression in Directive 2000/78”, thus hitting at the capacity of a piece of secondary legislation to substantiate a general principle.

¹² See for instance Joined Cases C-293 and 594/12 *Digital Rights Ireland* EU:C:2014:238 and C-617/10 *Åkerberg Fransson* EU:C:2013:105. Here, the Court did not openly rule on the direct effect of Charter, but its provisions were nonetheless used to challenge conflicting EU or national law. See P. Craig and G. de Búrca, *EU Law* (5th edition, Oxford University Press, 2015), 196.

substantive unconditionality and sufficient precision - to be directly invoked in all the situations falling within the scope of EU law. Therefore, the Directive as an instrument of secondary law does not *of itself* confer a right to paid annual leave, but only brings the situation at stake in the main proceedings within the scope of EU law, thus triggering the application of the Charter.

This two-fold significance of the judgment can be better grasped by making a comparison with the previous case law on the right to paid annual leave, from which the ruling commented marks an important departure. Illustrative in this sense are two previous cases, *Dominguez* and *Heimann*,¹³ regarding the right to paid annual leave.

Both touching upon the interpretation of Article 7 of the Working Time Directive and Article 31 (2) of the Charter, these cases are instructive of the Court's reluctance to engage with the issue of the constitutional status of the Charter and the distinction between rights and principles enshrined therein.¹⁴ By restating that the entitlement of every worker to paid annual leave is a "particularly important principle of EU social law" without specifying its concrete constitutional status in the context of the Charter, the Court neither recognised the role of the Charter as the primary source of EU fundamental rights, nor clarified whether the "right" to paid annual leave should have been interpreted as a principle within the meaning of Article 52 (5) or as a general principle of EU law.¹⁵

In both the abovementioned cases, the Court avoided to rule on the legal status of Article 31 (2) and thus on its possible (horizontal) direct effect. Specifically, in *Dominguez*, the Court not only circumvented the question about the nature of Article 31 (2), but also excluded such a provision from its review of the national legislation, using the Working Time Directive as the sole standard of legality. In other words, there, the Directive became the ceiling for the protection of the right to paid annual leave conferred by Union law. The Charter was not even used as tool of interpretation of the national rules, given the omission of any reference to it.

¹³ Case C- 282/10 *Dominguez* and Joined Cases C-229/11 and 230/11 *Heimann and Toltschin* EU:C:2012:693.

¹⁴ For a comment on *Dominguez* as an example of judicial minimalism see L Pech, 'Between judicial minimalism and avoidance: The Court of Justice's sidestepping of Fundamental constitutional issues in *Römer* and *Dominguez*', 49 *CMLR* (2012), 1841-1880.

¹⁵ The distinction is far from being merely terminological, but on the contrary has important implications in terms of enforceability. See J Krommendijk, 'Principled silence or mere silence on principles? The role of the EU Charter's principles in the case law of the Court of Justice' in 11 *European Constitutional Law Review* (2015), 321-356.

In *Heimann* instead, the Court used Article 31 (2) of the Charter, together with Article 7 of the Directive, as a standard of legality against which it reviewed the national rules at stake.¹⁶ In this case, despite the silence on its legal status, Article 31 (2) served the judicial function attributed to Charter's principles, which, albeit not capable of giving rise to enforceable individual claims and thus creating a legal standing for individuals, can still be "judicially cognisable" within the meaning of Article 52 (5) of the Charter, so as to be used as hermeneutical tools or a standard of review of national legislations.

The fact that in *Bauer et al* the right to paid annual leave has been elevated to a fundamental social right, capable *as such* of horizontal direct effect, that is, regardless of whether it has been given expression in EU secondary law, differs from the mentioned jurisprudential line in two senses.

First, it may suggest – even if more timidly than what expected¹⁷ – that the horizontal direct effect of the Charter is no longer a by-product of the lack of horizontality of directives.

Second, it clarifies the relationship between the legal sources of the EU legal order, specifically between primary and secondary law.

As already mentioned, in *Bauer et al*, it is the Charter, and not the Directive, that becomes the source of the right to paid annual leave. The Directive, as an act of secondary law, does not create that right, but simply codifies what already recognised in many international instruments. Therefore, it further specifies the concrete conditions for its exercise, such as the duration of annual leave and the practical conditions for its concrete exercise. Although in the *Mangold/Kücükdeveci* saga the Court similarly held that the Directive does not itself lay down the principle of equal treatment, which rather derives from various international instruments, there were still doubts about the role of EU secondary legislation. The *Kücükdeveci* reference to a general principle 'as given expression' in a directive seemed to suggest that, despite its status of primary law, a general principle can have direct effect only when it is substantiated by a piece of secondary legislation.¹⁸

¹⁶ Ibid.

¹⁷ This is because in the case of Mrs Bauer it is still the Directive and not the Charter that determines the setting aside of the inconsistent national legislation.

¹⁸ See E Muir 'Of ages in - and edges of – EU law', 48 CMLR (2011), 39, 59-60.

Bauer et al, thus, offers the authority to affirm that the fact that a Charter right is given further specification in a directive is immaterial for the purposes of its (horizontal) direct effect.

This reasoning is then consistent with what the Court has held in *Association de Médiation Sociale (AMS)*.¹⁹ There, the Court found that Article 27 of the Charter on workers' right to consultation and information within the undertaking could not be relied upon to disapply the inconsistent national legislation, whether invoked alone or in conjunction with the directive implementing it, insofar as it lacks the qualities for direct effect.

As noted by Advocate General Bot in his interpretation of the judgment, *AMS* can be read as a welcomed step in the refinement to the doctrine of horizontal direct effect because it states that it is sufficient to have a clear and precise provision of mandatory nature to produce direct effect with no need for further elucidation in secondary legislation.²⁰ The *AMS* judgment then overcomes the lack of clarity and the circularity stemming from the *Kücükdeveci* line of case law insofar as it affirms that, if a provision of the Charter lacks the qualities to be invoked directly, it cannot *a fortiori* produce direct effect by being complemented by a directive. In other words, a directive cannot confer on a Charter provision the qualities required for direct effect that the primary law provision does not possess itself. It simply works as a trigger for the application of the Charter, as it marks a field as governed by EU law notwithstanding its inapplicability in horizontal disputes.

Therefore, besides the prohibition of discrimination and the right to effective judicial protection enshrined, respectively in Articles 21 and 47,²¹ the right to paid annual leave in Article 31 (2) of the Charter is sufficiently precise and mandatory so as to be capable of horizontal direct effect.

Concluding remarks

The judgment delivered in *Bauer et al*, acknowledges the constitutional status of EU fundamental (social) rights, by conferring on the Charter a more substantial rather than cosmetic function, namely

¹⁹ Case C-176/12 *Association de Médiation Sociale v. Sociale* EU:C:2014:2.

²⁰ Mandatory nature that in the case at stake the Court did not recognize in Article 27 of the Charter on workers' rights to information and consultation within the undertaking.

²¹ See Case C- 414/16 *Egesenber* EU:C:2018:257

the capacity to displace an incompatible national legislation whenever the directive does not apply.²² In particular, the right to paid annual leave is definitely attracted into the scope of EU primary law by virtue of the Charter, and as such is directly invocable by individuals in horizontal disputes regardless of its “concretisation” in a directive.

However, it is not possible to infer from this judgment the horizontal direct applicability of the *whole* Charter. In terms of methodology, the doctrine of horizontal direct effect embraced by the Court is still far from being anchored to a solid framework: notwithstanding the intention to overcome the distinction between principles and rights, it is still unclear how the mandatory nature of a Charter provision can be ascertained. The impression is that, overall, despite the possibilities offered by the fact that the Charter now appears as a source of EU fundamental social rights capable of independent legal effects within national systems, its horizontal applicability is still treated as a palliative for the lack of horizontal direct effect of directives.

²² Indeed, when the directive applies the application of the Charter for the purposes of setting aside an incompatible national legislation is redundant.